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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/815,716	04/02/2004	Eric Evert Voogt	90000-A	9430
2048	7590	09/08/2005	EXAMINER	
KIRBY EADES GALE BAKER BOX 3432, STATION D OTTAWA, ON K1P 6N9 CANADA			VALENTI, ANDREA M	
			ART UNIT	PAPER NUMBER
			3643	

DATE MAILED: 09/08/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/815,716

Applicant(s)

VOOGT, ERIC EVERT

Examiner

Andrea M. Valenti

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 June 2005.
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,5,17-20,29,36,37 and 40 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1,5,17-20,29,36,37 and 40 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 17, and 20 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 2,716,938 to Smith.

Regarding Claim 1, Smith teaches a plant support for use with an open-topped plant container for a growing plant ("for use" language is functional language and merely means the structure must be capable of performing that function and Smith's Fig. 3 is capable of functioning as a plant support in and open top container), the plant support comprising: a single endless loop (Smith 27, 28, 30, and 31) of stiff linear material having a rectangular or trapezoid shape and having a 90 degree bend between parts of the loop thereby forming a plant support member and an anchor member each made up of a pair of elongated rods (Smith Fig. 3 #27 and 28) cross-connected with a connecting rod (Smith Fig. 4 #31 and connecting rod near #30 in Fig. 3) at the end of the pair of rods remote from the bend, the plant support member and the anchor member thereby being rigidly and permanently attached to each other at the bend; the plant support member having a generally vertical orientation and having a lower end at the bend and an upper end remote from the lower end, the connecting rod of the plant support member being adjacent to the upper end and grippable by hand; and the anchor

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member forming a base element extending generally horizontally, whereby the base element may be ("may be" again is functional language that the apparatus must merely be capable of performing the function and Smith's apparatus is capable of being positioned beneath growing medium, etc) positioned beneath a mass of growth medium in the container with the plant support member extending vertically from the mass of growth medium to facilitate support of a plant growing in the mass, and to facilitate lifting and transportation of the container filled with the mass of growth medium via the part of the plant support member that is grippable by hand

Regarding Claim 17, Smith teaches the stiff material is metal wire (Smith Col. 3 Line 50-69)

Regarding Claim 20, Smith teaches a horizontal plant support member adapted for engaging the elongated rods the plant support member that has a vertical orientation and the plant support member having a vertical orientation comprising elongated rods having confronting inner surfaces and opposite outer surfaces (Smith #28 and 31 of Fig. 3 constitute the support member and the inner members of Fig. 3 constitute the elongated rods).

Claims 1, 17, 20, 36, 37, and 40 are rejected under 35 U.S.C. 102(b) as being anticipated by Japanese Patent JP 03098515 A to Fujita.

Regarding Claim 1, Fujita teaches a plant support for use with an open-topped plant container (Fujita Fig. 2 (a) #3) for a growing plant (Fujita #5), the plant support comprising: a single endless loop (Fujita Fig. 1 when in an assembled state the plant

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support is single endless loop per the outer perimeter of element #1) of stiff linear material (Fujita English translation page 3 line 5) having a rectangular or trapezoid shape and having a 90 degree bend (Fujita Fig. 2(a) #1) between parts of the loop thereby forming a plant support member (Fujita #1 vertical portion) and an anchor member (Fujita #1 horizontal portion) each made up of a pair of elongated rods cross-connected with a connecting rod at the end of the pair of rods remote from the bend (see attached Fujita Fig. 1), the plant support member and the anchor member thereby being rigidly and permanently attached to each other at the bend; the plant support member having a generally vertical orientation and having a lower end at the bend and an upper end remote from the lower end, the connecting rod of the plant support member being adjacent to the upper end and grippable by hand; and the anchor member forming a base element extending generally horizontally, whereby the base element may be positioned beneath a mass of growth medium (Fujita Fig. 2(b) #4) in the container with the plant support member extending vertically from the mass of growth medium to facilitate support of a plant growing in the mass, and to facilitate lifting and transportation of the container filled with the mass of growth medium via the part of the plant support member that is grippable by hand (Fujita teaches the plant support member is securely positioned inside the plant container which would allow one to carry the combination by gripping the top of the element #1).

Regarding Claim 17, Fujita teaches the stiff material is selected from the group consisting of metal wire, plastic-coated metal wire, metal rod, plastic-coated metal rod,

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molded plastic rod, and molded fiberglass rod (Fujita page 2, right hand column, second paragraph from the end).

Regarding Claim 20, Fujita teaches a horizontal plant support member adapted for engaging the elongated rods the plant support member that has a vertical orientation and the plant support member having a vertical orientation comprising elongated rods having confronting inner surfaces and opposite outer surfaces (Fujita Fig. 1 the perimeter members constitute the plant support member and the inner members of element #1 constitute the elongated rods).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Japanese Patent JP 03098515 A to Fujita in view of U.S. Patent No. 3,206,649 to Barakauskas.

Regarding Claim 5, Fujita teaches the plant support member is in the form of two or more elongated rods (Fujita Fig. 1), but is silent a further connecting rod that extends laterally beyond the pair of elongated rods of the plants support member. However, Barakauskas teaches a plant support with to elongated rods that are cross-connected between the upper and lower end (Barakauskas Fig. 1 #44 and 54). It would have been obvious to one of ordinary skill in the art to modify the teachings of Fujita with the teachings of Barakauskas at the time of the invention since the modification is merely

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the known addition of additional support for the plant and to fill in the center area of the pot to give a fuller appearance to the foliage in the flowerpot. Fujita as modified teaches at least one of the connecting rods extends laterally beyond two or more of the elongated rods (Barakauskas Fig. 1 #54), thereby providing points of support for the plant's branches/vines extending laterally beyond the rods

Claims 18, 19, and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Japanese Patent JP 03098515 A to Fujita in view of European Patent EP 0079758 to Madonia.

Regarding Claims 18 and 29, Fujita is silent on the supporting member is provided with horizontal notches positioned at regular intervals between the upper and lower ends. However, Madonia teaches a plant support with horizontal notches positioned at regular intervals between the upper and lower ends (Madonia Fig. 3 #14). It would have been obvious to one of ordinary skill in the art to modify the teachings of Fujita with the teachings of Madonia to retain the plant ties as taught by Madonia (Madonia abstract).

Regarding Claim 19, Fujita as modified is silent on the regular intervals are separated from each other by a distance in the range of 5 to 30.5cm (2 to 13 inches). However, it would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the teachings of Fujita since the modification is merely the change in size of the intervals while performing the same intended function modified to

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accommodate different plant varieties and does not present a patentably distinct limitation [*In re Rose*, 220 F.2d 459, 463, 105 USPQ 237, 240 (CCPA 1955)].

Response to Arguments

Applicant's arguments filed 30 June 2005 have been fully considered but they are not persuasive.

Claim 1 and 36 do contain the exact language that was previously claimed in dependent claim 4 and thus the rejection under 35 U.S.C. 102(b) still stands for the reasons presented in the above rejection.

Examiner maintains that Fujita as modified by Barakauskas and Madonia teach each and every claimed limitation. Even though Fujita may contain additional components (e.g. netting) than what is claimed by applicant, it does not mean that applicant's invention is patentably over Fujita. For example, merely eliminating an element and its function does not present a patentably distinct limitation if the function of that particular element is not desired [*In re Karlson*, 311 F.2d 581, 583, 136 USPQ 184, 186 (CCPA 1963); *In re Kuhle*, 536 F.2d 553, 188 USPQ 7 (CCPA 1975)].

In response to applicant's argument that applicant's device is more for the application of lifting the plant containers than it is for used in transplanting or structural support for the plant branches; however, **a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed**

invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Since Fujita teaches that the plant support member is securely positioned into the plant pot it is inherently capable of performing the lifting function presented by applicant (Fujita English Translation page 4 line 5-7).

The Barakauskas references was cited merely to teach that it is old and notoriously well-known to provide a horizontal member between two vertical members to provide support for growing plant branches. This is knowledge available to one of ordinary skill in the art and one would be motivated to make the modification of the known success of providing support to the plant.

Madonia was cited to teach that it is old and notoriously well-known to provide notches on a plant support to facilitate securing the plant to the plant support. In response to applicant's argument regarding the Madonia reference, the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

Examiner maintains that applicant has not patentably distinguished over the teachings of the cited prior art.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

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§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

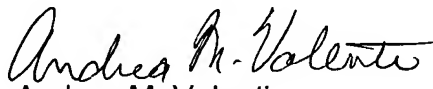
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrea M. Valenti whose telephone number is 571-272-6895. The examiner can normally be reached on 7:00am-5:30pm M-Th.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 571-272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Andrea M. Valenti
Patent Examiner
Art Unit 3643

02 September 2005


Peter M. Poon
Supervisory Patent Examiner
Technology Center 3600

9/2/05

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Element X_1 and X_3 = pair of elongated rods

